TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 232.

THE JOSEPH SCHLITZ BREWING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 27, 1900.

(17,692.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 578.

THE JOSEPH SCHLITZ BREWING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

THE JOSEPH SCHLITZ BREWING COMPANY
v.
THE UNITED STATES. } No. 20976.

I.—*Petition.*

(Filed January 21, 1898.)

To the honorable the Court of Claims:

The claimant, The Joseph Schlitz Brewing Company, respectfully represents:

The claimant is, and has been continuously for a period long preceding the dates of all the matters hereinafter stated, a corporation created, organized and doing business under the laws of the State of Wisconsin, engaged in the business of brewing, manufacturing, bottling and selling fermented liquors, both for domestic consumption and for export, and having its brewery and principal place of business in the city of Milwaukee, in said State of Wisconsin.

By section 25 of the act entitled "An act to reduce the revenue and equalize duties on imports, and for other purposes," approved October 1, 1890, it is provided as follows:

"That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles, a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: Provided, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials shall so appear in the completed articles that the quantity or measure thereof may be ascertained. And provided further, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

That by section 22 of the act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," which took effect on the 28th day of August, in the year 1894, the provisions of said section 25 of the act approved October 1,

1890, were re-enated word for word, and remained in force until the 24th day of July, in the year 1897, when, by section 30 of the act approved on that date, entitled "An act to provide revenue for the Government and to encourage the industries of the United States," they were again re-enacted, word for word, and are still in force.

2 That while said acts of October 1, 1890, and August 28, 1894, were in force, to wit at various dates beginning the 1st day of February, in the year 1893, and ending on the 26th day of October, in the year 1894, the claimant in this case in the regular and ordinary course of its business aforesaid, exported from the United States a large quantity of bottled beer, brewed and manufactured by them, and in the manufacture whereof the hops, barley, bottles and corks were exclusively of foreign origin and which had been regularly imported into the United States, and on all of which duty had been paid to the United States according to law.

In the manufacture of beer for export it becomes necessary to kill the yeast in the beer in order to prevent second fermentation and consequent ruin of the beer, and, in order to destroy the germs of yeast, the finished beer must be steamed to the degree necessary to kill such germs, and for that purpose the beer must be inclosed securely in some vessel to prevent the escape of the carbonic acid gas, and of all such vessels a bottle manufactured of glass is the one best adapted for that purpose. Such beer, after being subjected to the process of steaming, is materially different from the beer before being subjected to steaming, and in order to create such different article a closed glass bottle is indispensable, and the bottles and corks, forming a portion of the complete manufactured article known as "bottled beer," are, as well as the hops and barley entering into the same, a necessary component part of the article when completed and in a condition ready for export.

Under section 3019 of the Revised Statutes of the United States, which is a provision similar but not identical in terms with the provisions of the acts of 1890, 1894 and 1897 hereinbefore quoted, it was ruled by the Treasury Department, under date of March 31, 1886, that "On the exportation of beer manufactured wholly of imported materials, bottled in imported bottles and corked with imported corks, a drawback will be allowed for the hops, rice, and barley used in the manufacture at the rate prescribed by the department's letter to you on the 25th instant, and for the bottles and corks at the rate of duty paid thereon, less the legal retention of 10 per cent;" and in the official table of drawback rates prescribed by the Secretary of the Treasury under date of August 17, 1886, bottles and corks used in bottling beer were specifically named as entitled to the benefit of drawback rates to the full amount of the duty paid. This ruling remained in force until the 28th day of October, in the year 1890, when, under the tariff act of October 1, 1890, it was ruled that "imported bottles used in the bottling of fermented liquors made in the United States, wholly from domestic grain and hops, are not entitled on the exportation of such bottled beer to drawback under the provisions of section 25 of the act of

October 1, 1890." But, notwithstanding this ruling, drawback continued to be allowed and paid on bottles and corks used in the bottling of fermented liquors made in the United States from foreign grain and hops, as well as upon such grain and hops themselves, until the 24th day of March, in the year 1893, when by a further ruling of the Treasury Department all earlier decisions authorizing the allowance of drawback on imported bottles, corks
and tinfoil used in bottling beer for export were rescinded
3 and set aside, and from and after the date of said last-mentioned decision the Treasury Department has refused to allow any drawback whatever on bottles, corks or tinfoil used in the manufacture of bottled beer for export, irrespective of the question whether the hops and barley used in the manufacture of such beer were of foreign or domestic origin.

The claimant herein, relying upon the law, and upon the earlier decisions of the Treasury Department thereunder, purchased from time to time large quantities of foreign bottles and corks, as well as of foreign hops and barley, for use in the manufacture of bottled beer for the export trade, on all of which bottles and corks, as well as upon the hops and barley, the duties imposed by law were paid at the time of their importation, and the same were used in the manner hereinbefore described in the manufacture of bottled beer for the export trade, and such beer was thereupon exported to foreign ports in different quarters of the globe.

The claimant duly entered the same at the custom-house at the port of Milwaukee for exportation for the benefit of drawback, and made proof to the satisfaction of the collector of said port of the foreign origin of said hops, barley, bottles and corks, of the payment of duties thereon and the amount thereof, and of the fact that the same had been used in the manufacture of bottled beer as hereinbefore set forth, and otherwise complied with the law and with all the regulations prescribed by the Secretary of the Treasury thereunder for the establishment of the right to drawback. But said collector, acting under and in obedience to the decision of the Treasury Department hereinbefore referred to, dated March 24, 1893, refused to allow the drawback on the bottles and corks and was willing only to allow the same on the hops and barley, but none of said drawback has been paid, owing to the unwillingness of these claimants to accept the drawback on the hops and barley alone lest, as they were included in the same entry with the bottles and corks, an acceptance of the same might be pleaded in bar to their right to recover drawback also on the bottles and corks.

On the entries so made for exportation of bottled beer manufactured exclusively from foreign hops, barley, bottles and corks from the 1st day of February, in the year 1893, to the 26th day of October in the year 1894, the total amount of drawback on the hops and barley, being the amount of duties paid thereon less the legal retention of one (1) per cent., was two thousand three hundred and seventy-one dollars and thirty-five cents ($2,371.35), and on bottles and corks nine thousand eight hundred and seventeen dollars and

ninety-seven cents ($9,817.97), making a total of drawback due on such exportations, twelve thousand one hundred and eighty-nine dollars and thirty-two cents ($12,189.32), which amount the claimant hereby claims.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

4 The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant claims twelve thousand one hundred and eighty-nine dollars and thirty-two cents ($12,189.32).

GEORGE A. & WM. B. KING,
Attorneys for Claimant.

STATE OF WISCONSIN, }
City and County of Milwaukee, } ss:

August Uihlein, secretary of the Jos. Schlitz Brewing Co., the claimant corporation, being duly sworn, deposes and says: I am secretary of the Jos. Schlitz Brewing Co., the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

AUGUST UIHLEIN.

Subscribed and sworn to before me this 17th day of January, 1898.

[SEAL.]

EUGENE WUESTHOFF,
Notary Public, Milwaukee Co., Wis.

5 II.—*Traverse. Filed November* 8, 1899.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the said petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney General.

6 III.—*Findings of Fact, Conclusions of Law, and Opinion.*

Filed January 15, 1900.

Findings of Fact.

The following are the facts of the case as found by the court:

I. The claimant is a corporation, organized under the laws of the State of Wisconsin.

II. Between the 1st day of February, 1893, and the 26th day of October, 1894, the claimant exported from the port of Milwaukee, Wis., bottled beer. The hops, barley, bottles, and corks used in the manufacture of this bottled beer had been imported into the United States from foreign countries, and duties had been paid thereon upon importation. The bottled beer was manufactured by the claimant at Milwaukee, Wis. The imported materials used in the manufacture, when exported, were identified, the quantity of the materials used and the amount of duties paid thereon ascertained, and the fact of the manufacture of the articles in the United States and their exportation were determined under regulations prescribed by the Secretary of the Treasury. The total amount of the duties paid on the materials mentioned so used and exported was $12,189.32, divided as follows: Upon the bottles and corks, $9,817.97; upon the hops and barley, $2,371.35.

III. The Treasury Department has not refused to pay the drawback upon the hops and barley, but such drawback could be paid under the regulations of the department. It refuses to pay the drawback upon the bottles and corks for the reason stated in the following official letter dated March 24, 1893:

"TREASURY DEPARTMENT, *March* 24, 1893.

"SIR: The department is in receipt of your letter of the 15th instant, relative to the application of the Anheuser-Busch Brewing Association of St. Louis, Mo., for an allowance of drawback on imported corks and tinfoil used, together with domestic bottles, in the bottling of beer for export.

"The applicants represent that such corks and tinfoil are imported materials used in the manufacture of bottled beer and are therefore entitled to drawback under section 25 of the act of October 1, 1890, and they allege that such drawback is and has been allowed at your port.

"You state that under existing law no claims on bottled beer where the bottles are of domestic production, have been made at your port.

"It appears, however, that in view of the department's decision of March 3, 1886 (synopsis 7445), authorizing allowance of drawback on imported bottles and corks used in bottling beer made wholly from imported materials, under section 3019, Revised Statutes, which seems to have been based upon the assumption that bottles and corks are 'materials' used in the manufacture of bottled beer, your office would hold that the imported corks and tinfoil in

question are entitled to drawback under section 25 of the act of October 1, 1890, were it not for a more recent decision, viz. (synopsis 10301, of October 28, 1890), that 'Imported bottles used in the bottling of fermented liquors made in the United States wholly from domestic grain and hops are not entitled, on the exportation of such bottled beer, to drawback under the provisions of section 25 of the act of October 1, 1890.'

"In reply, you are informed that said decision of October 28, 1890, appears to have been made upon due consideration of the question whether or not bottles, corks, and tinfoil used in bottling beer for export may properly be considered as materials entering into the manufacture of bottled beer and that a negative conclusion has been reached.

"The department therefore decides that the present application must be denied, and the earlier decisions authorizing allowance of drawback on imported bottles, corks, and tinfoil used in bottling beer for export are accordingly rescinded.

"Respectfully yours, O. L. SPAULDING,
"*Acting Secretary.*

"(2826*g*.)

"Collector of customs, New York."

IV. The Treasury Department, on March 31, 1886, rendered the following decision:

"TREASURY DEPARTMENT, *March* 31, 1886.

"SIR: On the exportation of beer manufactured wholly of imported materials, bottled in imported bottles and corked with imported corks, a drawback will be allowed for the hops, rice, and barley used in the manufacture at the rate prescribed by the department's letter to you of the 25th instant, and for the bottles and corks at the rate of duty paid thereon, less the legal retention of 10 per cent.

"Respectfully yours, C. S. FAIRCHILD,
"*Acting Secretary.*

"Collector of customs, New York."

7 The following is a circular issued by the Treasury Department on August 17, 1886, so far as relates to this question:

"TREASURY DEPARTMENT, *August* 17, 1886.

"The following list of drawback rates is published for the information of customs officers and all others concerned.

"C. S. FAIRCHILD,
"*Acting Secretary.*

"Collectors of customs and others.

"Alphabetical list of drawback rates established under the authority of sections 3019, 3020, and 3026 of the Revised Statutes, and the acts of February 8 and March 3, 1875.

* * * * * * *

"Bottles and corks, imported, used in bottling beer made from imported materials, same as duty paid."

* * * * * * *

V. The rule announced in the official statements contained in the foregoing finding remained in force until the following ruling of October 28, 1890, was made by the Treasury Department:

"TREASURY DEPARTMENT, *October* 28, 1890.

"GENTLEMEN: In reply to your letter of the 13th instant, you are informed that, in the opinion of this department, imported bottles used in the bottling of fermented liquors made in the United States, wholly from domestic grain and hops, are not entitled on the exportation of such bottled beer to drawback under the provisions of section 25 of the act of October 1, 1890, referred to by you.

"Respectfully yours, O. L. SPAULDING,
"*Assistant Secretary.*

"Messrs. Larzelere & Co., Philadelphia, Pa."

VI. The manufacture of beer is a complicated process involving many different steps, consisting substantially of the following:

1. Washing, cleaning, steeping, and sprouting the barley.
2. Drying, storing, and crushing the barley, removing the sprouts, and crushing the malt.
3. Making the mash by mixing the malt with water and raising the temperature and drawing off the resulting liquor or wort.
4. Boiling the wort, adding hops, and reboiling.
5. Cooling the wort and mixing it with yeast.
6. Fermenting the wort, thereby making beer.
7. Storing the beer to produce desired chemical changes.
8. Clarifying the beer in casks by the use of chips and isinglass and carbonating, for this purpose using a solution of young beer called "kräusen."
9. Racking the beer into barrels, if to be bottled; otherwise it is drawn directly into kegs.

VII. The manufacture of beer for bottling for export differs from the manufacture for ordinary domestic use both because the materials must be selected with greater care, and the process must be conducted differently in order that the bottled product may keep without change under varying conditions of climate, temperature, position, and transportation, and the beer preserve purity and clearness under all such varying conditions. Turbidity of bottled beer made for exportation must especially be avoided, as this renders the beer commercially unsalable. This is chiefly caused by the precipitation of albuminoids contained in the beer, and the differences in the process of manufacture between domestic beer and bottled beer for export are chiefly intended for the elimination of these albuminoids. It may also be caused by the germination of living yeast cells, and this is prevented by the process of pasteurization.

VIII. The differences may be summarized as follows:

In the process of malting a specially complete development of the angospern is necessary and the process must be conducted very

carefully. In drying the malt the raising of the temperature is very slow and the process takes longer than in the case of ordinary keg beer. The mashing is conducted at a higher temperature and occupies a longer time. The malt must be stored for at least two months for bottled beer for export, as against about three weeks for keg beer. The wort must be boiled with special care to eliminate the albuminoids. A finer grade of hops must be used to add to the ability of the beer to stay clear under all conditions. In the cooling process, which consists of running the beer over cold pipes in a glass inclosure into which filtered air is pumped, a stronger draft of air is required, in order to impregnate the wort with a larger quantity of oxygen to produce a higher fermentation and consequently fewer albuminoids. The subsequent fermentation process requires a longer time with bottled beer for export than with keg beer and the temperature is not allowed to rise as high. A higher attenuating yeast is used for the manufacture of bottled beer, taking out more albuminoids than the low attenuating yeast used in the manufacture of keg beer. The beer requires longer storage.

8 The quality of the beer prepared for bottling when in barrels prior to bottling differs from the keg beer at the same stage in the fact that the keg beer has more albuminoids in it, and these give it a bread-like taste, described as palate fullness, and increase its form-holding capacity. This is recognized as a valuable quality in keg beer, and the absence of this quality is recognized as a detriment, unavoidable in beer bottled for export because of the necessity for eliminating the albuminoids.

IX. After beer intended for bottling for export is placed in the barrels the following processes occur:

The barrels are hoisted to the required height of the filling machine, the stamp is taken off, canceled, and replaced, the keg is opened, a faucet entered in the lower hole, and the beer drawn from the barrel into the filling machine and through a proper disposal of siphons into the bottles. The bottles are then sent to the corking machines and corked; a thin metal cap is placed over the cork for the protection of the cork and a wire attached to the neck of the bottle and wound over the cork. The bottles are then placed in the steaming boxes and these boxes carried to a steaming vat which is filled with water and steam turned into the water, raising its temperature to about 150° and remaining at that temperature for about one hour, when it is cooled down to about 80° or 90°. This process, known as pasteurizing, is for the purpose of destroying living yeast cells and is necessary for beer bottled for export.

Pasteurizing can be done in a large vessel before bottling, but the beer would become again impregnated by contact with the atmosphere when afterwards drawn into bottles.

This process must be conducted carefully, because if the temperature rises too high the beer gets an unpalatable taste and the albuminoids remaining in it are more apt to be eliminated, resulting in a loss of clearness, which renders the beer unsalable.

This pasteurization may be omitted in the case of bottled beer for local use.

The bottles, previous to their use, undergo a special washing process with hot water and soda so arranged that the bottles are filled and emptied continuously. They are then washed in a tank filled with luke-warm water on the outside by hand and on the inside by brushes in the washing machine, and then rinsed with cold water before being placed in the racks to be filled.

Old as well as new bottles are used.

X. In making bottled beer, from the time of purchase of the ingredients until the completion of the finished product the process must be so managed as to diminish the albuminoids. When prepared as stated in the foregoing findings, bottled beer can stand the heat at the equator without being spoiled.

XI. Beer bottled for export is understood to be beer intended for shipment, whether to domestic or foreign points, and for use other than local and immediate. When beer is bottled for local and immediate use, it may be the same beer as hereinbefore described and prepared in the same manner as for export, including pasteurization, or it may be the same beer prepared in the same manner without pasteurization, or it may be ordinary keg beer, differing from bottled beer for export in the particulars described in findings VII and VIII, and without pasteurization.

XII. When bottled beer is sold to retailers, it is delivered in cases of bottles, and an extra charge is made to the purchaser for the case and bottles, which charge is credited to his account on the return of the case and bottles. A similar practice obtains on the sale of the bottled beer by the case by retailers to their consumers.

Conclusion of Law.

Upon the foregoing findings of fact the court decide, as a conclusion of law, that the claimant recover the sum of $2,371.35.

Opinion.

NOTT, Ch. J., delivered the opinion of the court:

The position of the claimant is in substance this:

The general purpose of the legislation involved in this suit is the imposition of customs duties which, incidentally, shall benefit domestic manufacturers and producers and their workmen. That benefit can accrue only in one way—by increasing the market price of articles manufactured or produced. The principle, standing by itself, extends no farther than the domestic markets of the country. So soon as the manufactured article seeks a foreign market the action of the tariff is reversed and what was a benefit becomes an injury, and the person helped is the foreign manufacturer and not the American. In the foreign market the American manufacturer labors under three disadvantages—he must pay greater prices for domestic materials; he must pay duties on imported materials; he must pay higher wages to his workmen.

Hence, in the foreign market he cannot compete with the foreign manufacturer, who, manufacturing at less cost, can undersell him. To that extent the protective legislation benefits the foreign manufacturer.

9 The true constituents of a purely and strictly protective law must be that the American manufacturer shall manufacture from American products for the American market, and thereby help the American producer as well as himself. But the overproduction of modern machinery has of late years overstocked the home market, and Congress have sought by appropriate legislation to bring foreign markets within the reach of the American manufacturer. To that end the legislative policy has been to allow the home manufacturer to manufacture his articles out of imported materials coming into the country practically duty free. It is manifest that if this favorable legislation is intended to put the American manufacturer on an equal footing with his foreign competitor in foreign markets it must be as broad as the articles which he manufactures, or, rather, as broad as the imported materials which he uses, so that anything and everything which enters into the cost of production shall be absolutely free from the additional cost of customs duties.

In the case now before us it is manifest that the manufacturer was compelled either to use bottles manufactured in this country or to import bottles upon which he had paid duties. As a matter of fact he resorted to the latter alternative. He claims that these bottles are materials used in the manufacture of bottled beer; and it is but just to say that he shows that this beer is manufactured expressly for bottling and for exportation; that it cannot be preserved and exported in any other way, and that from one point of view the bottle is as much an element of the intended product as the peculiar kind of beer which it contains. The manufacturer maintains that these duties will preclude him from competing in foreign markets with foreign brewers, contrary to what he believes to be the legislative intent, because he cannot manufacture this kind of beer for exportation without bottles, and cannot afford to pay duties on bottles when his competitors do not.

Nevertheless, if the intention was to put the American manufacturer upon an equal footing with the foreign manufacturer in foreign markets, the legislation of Congress has been imperfect and incomplete, and the courts, moreover, have deemed themselves confined to the words of the statutes when ascertaining the legislative intent.

The significant words of this act are "that where imported materials on which duties have been paid are used in the manufacture of articles" "there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used." (Act 1st October, 1890, 26 Stat. L., p. 617, § 25.)

In the case of a somewhat similar statute this court held that shooks imported to be used in the manufacture of boxes were not materials within the intent of the statute, but a finished product. (Tidewater Oil Co.'s Case, 31 C. Cls. R., 90.)

In the same case on appeal Mr. Justice Brown elucidates the different meanings which may be given to the word "materials," and he points out that logs are manufactured into boards and boards are fashioned into boxes; that the steel spring of a watch is made from iron ore, but by a number of processes or transformations, and that each successive step is a distinct process bringing forth an article which receives a new and different name; and he draws the general conclusion "that the finished product of one manufacturer becomes the material of the next in rank." (171 U.S. R., 210–216.)

In the case of the United States *v.* Allen (163 U. S. R., 499) the court held that the drawback authorized by this statute does not extend to imported coal, considered as an article for consumption; and the reasoning of the court leads to the conclusion that the right to a drawback must rest on an exported "article" composed, in whole or in part, of imported "materials." It may be true that the bottles are as essential in the manufacture of bottled beer as the barley and hops of which the beer is made, but the barley and hops whed they are imported are not beer, while the bottles are bottles and as complete before the American brewer uses them as when they are exported. We may infer from the decisions that if he had imported glass and manufactured the glass into bottles, he would have had a good claim for drawback as to any duties which had been paid upon the glass; but it must be held, under the authorities cited, that bottles are a finished product and not "materials used" in that combination which is the subject or basis of the present suit.

The judgment of the court is that the claimant recover the drawback on barley set forth in the foregoing findings, to wit, the sum of $2,371.35.

10 IV.—*Judgment of the Court.*

THE JOSEPH SCHLITZ BREWING CO.
vs.
THE UNITED STATES. } No. 20976.

At a Court of Claims held in the city of Washington on the 15th of January, 1900, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order and adjudge and decree that the said Joseph Schlitz Brewing Company have and recover of and from the United States the sum of two thousand three hundred and seventy-one dollars and thirty-five cents ($2,371.35).

BY THE COURT.

11

V.—*Application for Appeal.*

Filed March 22, 1900.

In the Court of Claims, Term 1899-1900.

THE JOSEPH SCHLITZ BREWING CO.
vs.
THE UNITED STATES. } No. 20976.

Now comes the claimant herein, by its attorneys, George A. & William B. King, and prays an appeal to the Supreme Court of the United States from the judgment of this court entered on the 15th day of January, 1900, so far as the same is adverse to its claim, and the claimant moves the court for an allowance of this appeal.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

VI.—*Allowance of Appeal.*

At a Court of Claims held in the city of Washington on the 22nd of March, 1900, it was ordered that the foregoing application for an appeal be allowed as prayed for.

BY THE COURT.

12

In the Court of Claims.

THE JOSEPH SCHLITZ BREWING COMPANY
vs.
THE UNITED STATES. } No. 20976.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, the findings of fact by the court, the conclusions of law thereon, and the opinion of the court, of the judgment of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 27th day of March, 1900.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No., 17,692. Court of Claims. Term No., 578. The Joseph Schlitz Brewing Company, appellant, *vs.* The United States. Filed March 27th, 1900.

24566

No. 232.

Brief of Stang & Stang

Office Supreme Court U. S.
FILED
MAR 22 1901
for Appellant.

Filed March 22, 1901.

Supreme Court of the United States.

THE JOSEPH SCHLITZ BREWING COMPANY
v.
THE UNITED STATES.

No. 232,
October Term, 1900.

Statement of Case, Assignment of Error and Argument for Appellant.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE JOSEPH SCHLITZ BREWING COMPANY, Appellant,
v.
THE UNITED STATES. } No. 232.

STATEMENT OF CASE, ASSIGNMENT OF ERROR, AND ARGUMENT FOR APPELLANT.

Statement of Case.

This is an appeal from the judgment of the Court of Claims refusing drawback under § 25 of the act entitled "An Act to reduce the revenue and equalize duties on imports and for other purposes," approved October 1, 1890 (1 Supp. R. S. 862; 26 Stat. L. 617), re-enacted as § 22 of the Act of August 28, 1894 (2 Supp. R. S. 313; 28 Stat. L. 551), as follows:

"That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles, a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties:

"*Provided*, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained.

"*And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided.

"That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

The claimant was a brewer at Milwaukee, Wisconsin, and manufactured and exported bottled beer, using imported hops, barley, bottles and corks, and paying duties upon all of them.

The court has given judgment for the drawback upon the hops and barley, and has denied payment of the drawback upon the bottles and corks on the ground that these were not materials used in the manufacture of the bottled beer exported.

Assignment of Error.

For error, appellant says that the court erred in holding that the bottles and corks used in the manufacture of bottled beer for export were not materials used in the manufacture of bottled beer in the United States, and in rendering judgment against the claimant.

Argument.

The findings of the Court of Claims show that the Treasury Department, in 1886, by formal decision under the then existing drawback law (R. S. § 3019), allowed drawback (Rec. 6) upon the imported bottles and corks used in the manufacture of bottled beer for export, and that this continued the official ruling of the Treasury Department until October 28, 1890 (p. 7), while drawback continued to be paid until as late as March 24, 1893 (p. 5). There is thus contemporaneous executive authority for the claimant's position, antecedent to the change of ruling whereby the right was denied.

The findings of the Court of Claims summarize the process used in brewing, dividing it into nine different steps. It then finds that the manufacture of beer for bottling for export differs from manufacture for domestic use, both in the selection of materials and the conduct of the process. Finding VII is as follows:

"The manufacture of beer for bottling for export differs from the manufacture for ordinary domestic use both because the materials must be selected with greater care, and the process must be conducted differently, in order that the bottled product may keep without change under varying conditions of climate, temperature, position, and transportation, and the beer preserve purity and clearness under all such varying conditions. Turbidity of bottled beer made for exportation must especially be avoided, as this renders the beer commercially unsalable. This is chiefly caused by the precipitation of albuminoids contained in the beer, and the differences in the process of manufacture between domestic beer and bottled beer for export are chiefly intended for the elimination of these albuminoids. It may also be caused by the germination of living yeast cells, and this is prevented by the process of pasteurization."

The court then finds specifically the several differences in the process of manufacturing beer for domestic use and for bottling for export, going into various details of the manufacture. The finding concludes with the following statement as to the resultant product:

"The quality of the beer prepared for bottling when in barrels prior to bottling differs from the keg beer at the same stage in the fact that the keg beer has more albuminoids in it, and these give it a bread-like taste, described as palate fullness, and increase its foam-holding capacity. This is recognized as a valuable quality in keg beer, and the absence of this quality is recognized as a detriment, unavoidable in beer bottled for export because of the necessity for eliminating the albuminoids."

The court then finds that, after the beer is manufactured, additional steps are necessary in the case of bottled beer for export, including that of bottling and the distinct act of pasteurizing. This consists in raising the temperature of the beer after bottling carefully to about 150° for about an hour, for the purpose of killing living yeast cells. It is an essential step for beer bottled for export.

These findings are in ultimate effect that the bottles and corks are in contemplation as a part of the finished product of manufacture, beginning with the selection of the materials and continuing throughout the process of manufacture; that bottled beer for export is a different article from beer for domestic use, generally sold in kegs; that the beer brewed for bottling for export is an incomplete product until it is united with the bottle and cork in the manufacture known as bottled beer; that the beer made for this purpose is more expensive and the product less palatable than ordinary keg beer and consequently is not marketable except as bottled beer and that in that completed form it undergoes still another process of manufacture.

For these reasons the bottles and corks, as well as the hops and barley, are to be considered as "materials used in the manufacture" of the article known as bottled beer.

The question is thus seen to be of the application of words of known meaning to the facts of the case. Whether the words of the statute shall receive the construction thus demanded must depend on the definition of the word "materials," when read in the light of the purpose designed by this statute and of the revenue system fixed by other statutes in *pari materia*. We shall maintain:

1. That the necessary purpose of this act requires the construction claimed.

2. That the construction claimed is the only interpretation which construes this act in consonance with the other acts on the same subject.

The Purpose of this Act.

The object of the drawback law has been delared in several judicial decisions. In Campbell *v.* United State, 107 U. S. 407, this court said (p. 413):

"The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country—articles which are not sold or consmued in the United States. The linseed in this case was bought abroad and imported for the purpose of being manufactured, and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case."

To similar effect is the definition given in Tide Water Oil Co. *v.* United States, 171 U. S. 210, where this court said (p. 216):

"The object of the section was evidently not only to build up an export trade, but to encourage manufactures

in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

The application of this idea to the present case is very simple. The American brewer wishing to export to to China meets in Chinese markets his German competitor. Beer can be sent there only as bottled beer, the findings show. For this product, hops, barley, bottles and corks are alike essential. German hops, barley and bottles are for sale at a lower price than American hops, barley and bottles. In competition in the Chinese market, the American brewer can not use American materials on account of the higher cost. Any increase in price would destroy the possibility of gaining the market. If he tries to purchase German barley, hops and bottles, he is met at the American custom-house by a protective tariff duty. Without a drawback, he must give up the market, since his German competitor has no such tariff handicap. The tariff is upon all three articles; all are alike essential to the complete manufacture of the exported article. The Treasury Department and the Court of Claims admit that he is relieved of his handicap to the extent of the tariff duty upon the barley and hops. They maintain, however, that the law, although designed to place him on an equality with his German competitor, still leaves him burdened with the duty on the bottles. The corks are in like case, differing only in the fact that both the German and American brewer must import them from Portugal. The German may pay no duty or may receive a drawback; the American pays a duty and receives no drawback, under the existing decisions.

Thus a burden is imposed upon American exporting manufacturers by our protective policy. Congress passes

a law in broad terms designed to relieve manufacturers of this burden; the Treasury Department and the Court of Claims, not denying the object, declare the act futile *quoad hoc*.

The Court of Claims frankly accepts this position, saying (Rec. 10):

"The true constituents of a purely and strictly protective law must be that the American manufacturer shall manufacture from American products for the American market, and thereby help the American producer as well as himself. But the overproduction of modern machinery has of late years overstocked the home market, and Congress have sought by appropriate legislation to bring foreign markets within the reach of the American manufacturer. To that end the legislative policy has been to allow the home manufacturer to manufacture his articles out of imported materials coming into the country practically duty free. It is manifest that if this favorable legislation is intended to put the American manufacturer on an equal footing with his foreign competitors in foreign markets, it must be as broad as the articles which he manufactures, or, rather, as broad as the imported materials which he uses, so that anything and everything which enters into cost of production shall be absolutely free from the additional cost of custom duties.

"In the case now before us it is manifest that the manufacturer was compelled either to use bottles manufactured in this country or to import bottles upon which he had paid duties. As a matter of fact he resorted to the latter alternative. He claims that these bottles are materials used in the manufacture of bottled beer; and it is but just to say that he shows that this beer is manufactured expressly for bottling and for exportation; that it can not be preserved and exported in any other way, and that from one point of view the bottle is as much an element of the intended product as the peculiar kind of beer which it contains. The manufacturer maintains that these duties will preclude him from competing in foreign markets with foreign brewers, contrary to what he believes to be

the legislative intent, because he can not manufacture this kind of beer for exportation without bottles, and can not afford to pay duties on bottles when his competitors do not."

But having come thus far, the court is unwilling to accept the statute as an apt expression of the legislative purpose and declares that "the legislation of Congress has been imperfect and incomplete," concluding that the words of the statute are insufficient to include the bottles and corks as materials of the manufacture.

It is shown by the findings that the beer contained in bottled beer for export is not of itself a completed article of manufacture, that the inspection and the several steps of the manufacture all imply the bottle, that the beer brewed for bottling is not marketed unbottled and that, after bottling, a separate step in the process is taken. Surely, when it is admitted that legislation is "imperfect and incomplete" without this inclusion, these facts bring the bottles and corks within the statutory terms of "materials used in the manufacture of" bottled beer for export.

It may fairly be assumed that when Congress passes a general law, in pursuance of a general policy, a construction should not be adopted which will defeat that policy unless the terms of the act positively require it. Especially will this be the case when the course of legislation *in pari materia* requires the broader construction to harmonize with other laws.

The Course of Legislation.

The general industrial policy of this country, framed for domestic purposes, is the preservation of the home market for home manufacturers. But the drawback law

is not the only statute framed to avoid the incidental imposition of burdens upon foreign trade because of this policy.

Under Rev. Stat. § 2971, merchandise imported and deposited in a bonded warehouse may be withdrawn by the owner for exportation without payment of duties. A Canadian brewer could bring his bottled beer to New York, deposit it there in a bonded warehouse, sell it on the New York Produce Exchange for export in immediate competition with American brewed beer and then export it without payment of any tax to the United States on bottles and corks or other materials. His American competitor, if the Treasury Department and the Court of Claims be correct, would have to pay the import duty on the bottles and corks, an absolutely essential part of the completed article.

If § 3019 and its statutory successors now are to be read as a part of the same financial and industrial system, the American brewer must be put on an equality with his Canadian competitor by giving him a drawback on all the imported materials of the completed article.

Under Rev. Stat. § 2977, if merchandise upon which duties have been paid is left in a bonded warehouse and then exported, the duties will be refunded. The Canadian brewer selling to South America, in competition with the American brewer, would have a drawback of the duties paid upon his entire product, bottled beer; but the American brewer, say the Treasury Department and the Court of Claims, can have no drawback on his bottles and corks. Surely such a construction fails to read the two statutes as consistent parts of a complete legislative system.

Where use is made of either of these two sections, 2971 or 2977, there is no American manufacture. It is therefore an essential to the encouragement of American

manufacture for export—a development of the statutory policy of protection—to put the domestic manufacturer in a position at least equal to that of the foreign manufacturer. This can not be done if he has to pay duty on his bottles and corks.

There is another law designed for the same purpose as the drawback law, to permit the manufacture in this country of articles of export from materials of foreign production, when these are necessary. Under § 9 of the act of August 28, 1894, (28 Stat. L. 548; 2 Supp. R. S. 309, re-enacted as § 15 of the act of July 24, 1897, 30 Stat. L. 207; 2 Supp. R. S. 707; the former an extension of § 10 of the act of Oct. 1, 1890, 26 Stat. L. 614; 1 Supp. R. S., 858) articles manufactured of imported materials subject to duty may be manufactured in a bonded manufacturing warehouse without payment of duty and then exported, remaining duty free. This legislation was designed to encourage American manufactures. If the claimant's brewery had been made a bonded manufacturing warehouse for the manufacture of beer exclusively for export, the bottles and corks would have been imported without payment of duty and exported equally duty free.

Section 22 of the act of 1894 (§ 25 of the act of 1890) is intended to accomplish the same object in another way, by refunding on exportation the duties already paid. This purpose should be carried out to the same extent under the one as under the other statute. But the construction adopted in this case makes the remedy under § 22 incomplete as compared with that under § 9. Every reason exists why they should be of equal extent. Section 9 is designed for large establishments, operated exclusively for exportation. Section 22 permits the same privileges to be shared by every manufactory in the country and goods are made under it both for domestic

use and for export, under the same roof. It is capable of indefinite extension. The two sections are different ways of accomplishing the same purpose and should be construed as granting alike freedom from import duty to articles not entering into domestic consumption.

All the statutes cited are designed to prevent the protective system from being a restraint upon export trade. They should all be construed together as integral and consistent parts of the same system. All are so construed and operated except the drawback section in the particular here complained of. This can be brought into harmony only by allowing a drawback as now claimed.

Authorities Cited in Opposition.

In the opinion of the court below, several cases are cited in opposition to appellant's claim. Other authorities relied upon by counsel below will doubtless be cited here.

The first to be considered is that of Wheeler *v.* United States (75 Fed. Rep. 654). It is true that that was a claim under the same statute as this for drawback upon bottles and corks used in manufacturing bottled beer for export. But the facts presented in this case and here chiefly relied on did not there appear, any more than they did in the Treasury Department when the adverse decision was made in 1893. The sole reliance was upon the fact that the beer was made, bottled and exported. The decision of the court was based upon a definition of the word "materials" by this court in United States *v.* Allen (163 U. S. 499). The reasons on which the decision was founded were not given, nor was it shown how the language used in this court applied to the case.

The first important fact shown here but not shown in the Wheeler case, is that beer brewed for bottling is not, apart from the bottle, a completed manufacture. It is found not only that the bottle is contemplated both in

the selection of the materials and in all the steps of manufacture, but also that it is only when the materials making the beer are put into the bottle and corked, appearing as bottled beer, that a completed product first appears. Neither did it appear in that case that the bottled beer underwent a further process of manufacture after bottling.

As the decision in Wheeler *v.* United States was made on an incomplete record, so also was it based on an unwarranted implication from the decision of this court in United States *v.* Allen, 163 U. S. 499, cited by the Court of Claims. That case has no relation to this question. By the tariff act of 1883 (22 Stat. L. 511) coal was taxed at 75 cents a ton and, in the same paragraph, drawback of this amount was allowed on imported coal used on sea-going vessels. The drawback section of the act of 1890 (on which this suit is based) contains a proviso "that the drawback on any article allowed under existing law shall be continued at the rate herein provided." In that part of the act of 1890, paragraph 432 (26 Stat. L. 600), providing for a tariff on coal, the duty was continued at 75 cents per ton, but no drawback was provided. This court held that the provision in the act of 1890 continuing "drawback on any article allowed under existing law" did not continue the drawback on coal, that being repealed through the omission of the drawback provision from the re-enactment of the paragraph fixing the tariff.

This conclusion was strengthened by the consideration that the drawbacks allowed under § 25 of the act of 1890 related to materials entering into manufactured articles and (p. 503) "not to a raw material like coal, in the production of which no materials are used which enter into and form a part of the product." It is at once seen that this has no application to the pending

case. The foundation of the claim in this case is that the bottle is one of the materials from which bottled beer is manufactured. Bottled beer is not a raw material like coal. The materials entering into bottled beer are those on which drawback is here claimed; hops, barley, bottles and corks. A critical examination of the case of United States *v.* Allen not only destroys it as authority for this case, but shows that, since the case of Wheeler *v.* United States rested upon it as its sole support, that case can have no weight.

In Beadleston *v.* United States, 104 Fed. Rep. 295, the Wheeler case was followed, although some evidence as to steaming was produced. The facts shown in the pending case as to the separate manufacture of beer for bottling did not appear there, and the opinion of the court certainly implies that such proof would have made a difference in its conclusions, saying:

"I think on full consideration that the article is essentially the beer, without reference to the bottle; that the bottle is not a material part of the identity of the beer or of its quality or marketable identity as beer."

In the present case it is shown that the article is essentially bottled beer and not beer apart from the bottle; that there is reference to the bottle throughout the manufacture and that the quality and marketable identity of the beer is as bottled beer and that beer without the bottle is a different article of manufacture.

We have already cited the case of *Tidewater Oil Co.* v. *United States*, 171 U. S. 210, as supporting the general principles relied on in this case.

There the making of boxes from imported shooks was discussed and conclusions reached which definitely support the present contention. The court there said (p. 216):

"Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. * * *

"The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank."

It appears by the findings in this case (Rec. 7, 8), that the particular beer which is manufactured for bottling for export is only used for the particular purpose of bottling, not possessing qualities valued in keg beer, and that the process of manufacture is not completed when this beer is put into barrels, preparatory to bottling. It is brewed only for bottling and is completed only when bottled. It is not claimed that putting the beer into the bottles is a complete and separate manufacture, but it is claimed, since the bottle is contemplated from the beginning of the manufacture, since all the processes vary in brewing beer for the keg and for bottling, since the beer produced is not used without the bottle, and since, after the bottling itself, a separate process of manufacture follows while the beer is in the bottle, that the manufacture of bottled beer is a different manufacture from the manufacture of beer for use from the keg and that the bottle and cork, while themselves finished products of one manufacture, are integral materials of the manufactured article. We therefore confidently rest the decision of this case upon the principle announced by this court in the case just cited.

Conclusion.

This case differs from most of the cases coming before this court from the Court of Claims in one most important aspect. These generally relate to executed matters, such as claims for damages for breach of contract, or to matters affecting but a limited circle of Government employees, such as claims of army and navy officers or of classes of civil employees. They are for additional grants from the public treasury to those already in receipt of compensation for services rendered; they involve on the part of the claimants no large public interests and their decision can have no effect on the industrial prosperity of the country.

This claim is of a class in which the jurisdiction of the Court of Claims has not been widely sought, but which is of living concern to the great manufacturing interests of the country. A decision of this case upon broad principles rather than upon the technicalities of interpretation, will have a valued effect upon the constantly expanding export trade.

It will exhibit to those concerned in the industrial development of the country that the true construction of the laws of Congress is based upon a consideration of the legislative purpose and that where the object of the law is the development of trade, that, and not the immediate collection and retention of the utmost present revenue, is the chief concern of judicial interpretation.

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Attorneys for Appellant.

24579

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE JOSEPH SCHLITZ BREWING COMPANY, Appellant, v. THE UNITED STATES. } No. 232.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant brought suit in the Court of Claims for a drawback of the amount of duties paid by it upon certain imported hops, barley, bottles, and corks which it claimed it had used in the manufacture of bottled beer subsequently exported by it, the claim being based upon section 25 of the tariff act of October 1, 1890, and its reenactment in the act of August 28, 1894.

The court gave judgment for the drawback on hops and barley, but denied the claim as to the bottles and corks. Hence this appeal.

ARGUMENT.

The contention of the appellants is simple. It is also novel. It is that the bottles and corks which contain and cover the beer are (in the language of the drawback statute) "materials used in the manufacture of articles," and this equally with the hops and barley, out of which the beer contained in the bottles was made. And to support this startling proposition, it is adroitly urged that the finished product as exported is *bottled beer*, of which article the bottle and its cork are as much a part as the beer itself. This is true in a sense, as a precise designation of the article exported is undoubtedly beer in bottles, or bottled beer; but the statement as made is nevertheless sophistical, since the pertinent inquiry is not as to the nomenclature of the exported article, but solely: Were the bottles and corks materials used in manufacturing this article? Or, to state it otherwise: Do the bottles and corks, as a result of a process of manufacture, appear in the completed article as component parts thereof? Putting the question thus, substantially in the language of the statute which is relied upon as the foundation of the claim, it seems impossible to answer it in favor of the claimant.

AS TO "MANUFACTURE."

An able discussion of the term *manufacture* is to be found in an opinion of the honorable Solicitor of the Treasury, approved by the Treasury Department, given upon the question whether a drawback should

be allowed on imported corks used in bottling exported beer, from which I feel that I may well quote:

> In the present case the "imported materials" used in the so-called "manufacture" of the article were *already* "manufactured" corks before they were imported to the United States, coming within the classification of paragraph 416 of said act, and paying a duty of 15 cents or 25 cents per pound, according to size. No question is raised in the papers submitted that the article in question was not a "manufacture" of cork, in the sense of the statute, before it was imported. Besides, it must be observed that the corks are not exported as a substantive article, as the statute seems to contemplate, but are a means of securing or confining in bottles the article that is exported, namely, beer.
>
> The word "manufacture" is an active verb, and signifies:
>
> "1. To make or fabricate from raw materials, and work into forms convenient for use, especially by more or less complicated processes; as, to manufacture cloth, nails, or glass.
>
> "2. To work up into suitable form for use; as, to manufacture wool, cotton, silk, or iron." (Imperial Dictionary.)
>
> In *Foppes* v. *Magone* (40 F. R., p. 570) it was held that to constitute a "manufacture" there must be a transformation; and mere labor bestowed upon an article, even if that labor is applied through machinery, will not make a manufacture unless it has progressed so far that a transformation ensues and the article becomes commercially known as another and different

> article from that with which it began its existence. (See also *Bumgarten* v. *Magone*, 50 F. R., 69; *United States* v. *Summer*, 41 F. R., 324; Carr on Jud. Interpretation of Tariff Laws, p. 166, *et seq.*)
>
> Treasury Decisions, vol. 2, p. 993.

Mr. Justice Brown, in *Tide Water Oil Co.* against *The United States*, 171 U. S., 216, succinctly defines the word as follows:

> The word [manufacture] is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product.

The necessity of manufacture of the material imported in order that the drawback may be allowed has been frequently dwelt upon by this court.

> The purpose of the drawback provision is to make duty free imports which are manufactured here and then returned from whence they came or to some other foreign country.
>
> *Campbell* v. *United States*, 107 U. S., 413.
>
> The rule laid down in the proviso for determining the amount of drawback evidently had relation to articles manufactured from materials.
>
> *United States* v. *Allen*, 163 U. S., 503.
>
> What was doubtless meant was to allow this drawback upon articles manufactured within the United States either from the raw material or from material which was the result of the last complete manufacture.
>
> *Tide Water Oil Co.* (*supra*), p. 219.

The foregoing cases of Allen and the Tide Water Oil Company are especially relied upon by the Court of Claims in its opinion in this case.

It is true that for a time claims for drawback similar to the one under consideration were allowed by the Treasury Department, but when that Department came to itself it reversed its former ruling by a decision made April 15, 1893, as follows:

> A drawback is allowed upon imported barley, rice, hops, etc., actually used in the manufacture or production of beer, and is paid on the exportation of such beer. But the Department does not recognize bottles, corks, and tin foil as in any way the ingredients entering into the manufacture or production of beer, and has therefore no authority under the law to establish a rate of drawback upon such articles.
>
> Synopsis of Decisions for 1893, No. 13921, p. 328.

This decision has since been adhered to by the Treasury Department.

Claims identical with this have been sued upon in two instances in the Federal courts. In the case of *Wheeler* v. *The United States* (75 Fed. Rep., p. 654) the court, in its opinion, makes the following citation from the case of *United States* v. *Charles R. Allen* (163 U. S., 503):

> In the course of his opinion Mr. Justice White, in touching upon the meaning of the word "material," as used in section 25, said: "An added circumstance weighing against the

> construction that the proviso was intended to continue the drawback in question is the fact that the rule laid down in the proviso for determining the amount of drawback evidently had relation to articles manufactured from 'materials,' and not to a raw material like coal, in the production of which no materials are used which enter into and form a part of the product."

And thereupon concludes:

> This language clearly determines that the section relates to materials from which articles of exportation are manufactured or produced, and not to their coverings or packages.

And in *Beadleston et al.* v. *The United States* (104 Fed. Rep., 295), recently decided in the district court for the southern district of New York, the court held:

> The question is, are the *bottle, the cork, and the tin foil* "materials *used* in the *manufacture*" of the "*article*" exported? The article is labeled "Imperial Beer Brewed Specially for Export—Gold Label, etc." Mere cases or coverings are not deemed a part of the "article exported" and do not enter into its "manufacture." Notwithstanding the evidence as to steaming I think on full consideration that the "article" is essentially the *beer*, without reference to the bottle; that the bottle is not a material part of the identity of the *beer* or of its quality or marketable identity as beer, but only a convenient *case* for offering it to the public in a specific recognizable form which serves no other essential use. As such I think the bottles, corks., etc.,

are not entitled to a drawback under the act of October 1, 1890.

Wheeler v. *The United States* (75 F. R., 654).

This seems a most reasonable and natural view of the question. The corked bottle performs the same office with respect to the beer which it contains that a keg does to keg beer. In addition to being what is technically called the "package" of the beer, it operates to retain the carbonic-acid gas with which the beer is charged during its manufacture, and which gives it its *life*. It is, as compared with the keg, simply a superior package. As well, it would seem, might it be contended that the keg is a part of keg beer, the can of "canned lobster," the bag of "salt in bags," the hogshead of "wine in hogsheads," and the crate of "crated cheese," as that bottles and corks are a part of bottled beer.

And undoubtedly counsel for claimant are struck with the force of this argument, since they have presented evidence, appearing in the findings of the court, covering the whole ground of the process of manufacture of both keg and bottled beer, and place much stress upon the fact that it appears from these facts that there are many elements of difference between the process of manufacture of keg beer and that of bottled beer, although the general process is the same in each case.

As set forth in the brief of counsel for claimant, these differences of process consist:

In the elimination, as far as possible, of albuminoids in the beer intended for bottling, for the reason

that these albuminoids produce, in a short time, turbidity in the beer, and thus injure its appearance, although the same elements in the keg beer are desirable because of the agreeable flavor which they give to it.

And, finally, the bottled beer requires, in order that it may reach a finished state, that it should be sterilized or pasteurized to destroy the yeast germs in the beer, which, in time, would also produce in it an unpleasant cloudiness.

The evidence in the case shows that this pasteurizing can only be accomplished with complete success by steaming the beer in the bottles after it has been bottled and corked. Thus, the bottle, which finally becomes merely the covering or package of the beer, is first made use of as an appliance in which to complete the process of its manufacture. In this respect it will be seen that the bottle sustains no more necessary relation to the manufacture of the bottled beer than do the various other appliances which are used in the process of its manufacture. It may indeed be looked upon as the final appliance in the manufacture of beer bottled for export. And the bottle is not necessarily put to this use when the bottled beer is intended for local use. (Findings IX and XI.)

It should be observed in this connection that pasteurizing is no more essential to the successful manufacture of bottled beer for export than is the elimination of the albuminoids. Why, then, do not the appliances which are used for the elimination of albuminoids enter into the manufacture of the beer as much as the bottle does

which is used as an appliance in the pasteurizing of the beer? It seems plain that the contention of the claimant would never have been made if it were not for the coincidence that the bottle, after it has been used in steaming or pasteurizing the beer, is retained as its covering. In other words, if the beer after having been pasteurized in bulk, which the findings show can be done (Finding IX), could then be drawn into bottles without contamination from the atmosphere, the claimant would never have thought of contending that the bottle was anything more than a mere covering for the beer. His whole argument seems to be based upon the fact that after the bottle is used as an appliance in which to pasteurize the beer it accompanies the beer on its subsequent sale, instead of remaining in the brewery with the other appliances. The difficulty with the contention of the claimant is that he overlooks the well-established interpretation of the word "manufacture"—that the material or article employed must be transformed in the process of manufacture into another and different article, else it is not manufactured.

Further confirmation of the position of the Government in this case is found in the fact (Finding X) that in the course of trade, both between wholesalers and retailers and the retailers and their customers, a separate account is made of the bottles, and on return of the bottles the purchaser is credited with the value of the same. This would seem to be a species of divorcement of the beer and the bottle—the twain that counsel have so lastingly joined together in their argument.

It goes to show clearly that the article that is purchased and desired is the beer, to which the bottle is but an incident, and that after the desired article is consumed, the bottle, rejected and undiminished, is ready to be returned to be again filled therewith.

THE PURPOSE OF THE STATUTE.

The chief reliance of the counsel for appellants is here, as in the Court of Claims, upon an argument based upon the supposed intention of Congress in enacting the drawback statute. This argument met with the most respectful treatment in the opinion of the Court of Claims, but was answered in this wise:

> Nevertheless, if the intention was to put the American manufacturer upon an equal footing with the foreign manufacturer in foreign markets, the legislation of Congress has been imperfect and incomplete, and the courts, moreover, have deemed themselves confined to the words of the statutes when ascertaining the legislative intent.

Conceding the force of the argument as presented to this court, it would seem that the above is still its conclusive answer. The language of the statute is perfectly plain and unambiguous, and hence there is no room for *construction*, no reason for inquiry into its purpose.

> *Lake County* v. *Rollins*, 130 U. S., 670–1.
>
> *St. Paul, &c., Railway Co.* v. *Phelps*, 137 U. S., 536.

In the language of Mr. Justice Lamar in the latter case—

> When the statute is free from all ambiguity, the letter of it is not to be disregarded in favor of a presumption as to the policy of the Government.

The same appeal was most eloquently and persuasively made to this court in a recent notable case, and yet the majority of the court felt constrained to disregard it. In delivering that opinion Mr. Justice Harlan said:

> We can not do that without going far beyond the obvious import of the words employed by Congress. * * * This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the Government in reference to any particular subject of legislation this court has said "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden* v. *The Collector* (5 Wall., 107, 111). Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once

recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed. (*United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S., 662, 670.)

Dewey v. *United States* (178 U. S., 520 and 521).

The claimant can scarcely look for a less strict application of the rule in this case than that made to the claim of the gallant victors of Manila Bay.

It is respectfully urged that the judgment of the Court of Claims in this case should be affirmed.

LOUIS A. PRADT,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 232.—October Term, 1900.

The Joseph Schlitz Brewing Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[May 20, 1901.]

This was a petition for a drawback upon hops and barley to the amount of $2,371.35, and upon bottles and corks to the amount of $9,817.97, used in the manufacture of bottled beer for export.

The Court of Claims made a finding of facts, the substance of which is set forth in the margin, and gave judgment for the first item, but rejected the second, and the claimant appealed.*

Mr. Justice Brown delivered the opinion of the Court.

This is a claim for a drawback of duties upon certain imported bottles and corks alleged to have been used in the manufactere of bottled beer, subsequently exported.

By section 25 of the Tariff Act of 1890, (26 Stat. 567, 617,) "where imported materials on which duties have been paid, are used in the manu-

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* *Findings of Fact.*

The following are the facts of the case as found by the court:

I. The claimant is a corporation, organized under the laws of the State of Wisconsin.

II. Between the 1st day of February, 1893, and the 26th day of October, 1894, the claimant exported from the port of Milwaukee, Wis., bottled beer. The hops, barley, bottles and corks used in the manufacture of this bottled beer had been imported into the United States from foreign countries, and duties had been paid thereon upon importation. The bottled beer was manufactured by the claimant at Milwaukee, Wis. The imported materials used in the manufacture, when exported, were identified, the quantity of the materials used and the amount of duties paid thereon ascertained, and the fact of the manufacture of the articles in the United States and their exportation were determined under regulations prescribed by the Secretary of the Treasury. The total amount of the duties paid on the materials mentioned so used and exported was $12,189.32, divided as follows: Upon the bottles and corks, $9,817.97; upon the hops and barley, $2,371.35.

III. The Treasury Department has not refused to pay the drawback upon the hops and barley, but such drawback could be paid under the regulations of the

facture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." The object of this section is evidently to stimulate domestic manufactures by allowing to the manufacturer a rebate of duties paid upon imported materials used by him in such product.

The theory of the claimant in this connection is, that bottled beer is really a different article from ordinary beer, and requires a process of manufacture in which bottles and corks are a material ingredient. Its argument is thus stated in the petition:

"In the manufacture of beer for export it becomes necessary to kill the yeast in the beer in order to prevent second fermentation and consequent ruin of the beer, and, in order to destroy the germs of the yeast, the fin-

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department. It refuses to pay the drawback upon the bottles and corks for the reason stated in the following official letter dated March 24, 1893:

(Here follows certain correspondence summarized in the opinion.)

VII. The manufacture of beer for bottling for export differs from the manufacture for ordinary domestic use, both because the materials must be selected with greater care, and the process must be conducted differently in order that the bottled product may keep without change under varying conditions of climate, temperature, position and transportation, and the beer preserve purity and clearness under all such varying conditions. Turbidity of bottled beer made for exportation must especially be avoided, as this renders the beer commercially unsalable. This is chiefly caused by the precipitation of albuminoids contained in the beer, and the differences in the process of manufacture between domestic beer and bottled beer for export are chiefly intended for the elimination of these albuminoids. It may also be caused by the germination of living yeast cells, and this is prevented by the process of pasteurization.

IX. After beer intended for bottling for export is placed in the barrels the following processes occur:

The barrels are hoisted to the required height of the filling machine, the stamp is taken off, canceled and replaced, the keg is opened, a faucet entered in the lower hole, and the beer drawn from the barrel into the filling machine and through a proper disposal of siphons into the bottles. The bottles are then sent to the corking machines and corked; a thin metal cap is placed over the cork for the protection of the cork and a wire attached to the neck of the bottle and wound over the cork. The bottles are then placed in the steaming boxes and these boxes carried to a steaming vat which is filled with water and steam turned into the water, raising its temperature to about 150° and remaining at that temperature for about one hour, when it is cooled down to about 80° or 90°. This process, known as pasteurizing, is for the purpose of destroying living yeast cells, and is necessary for beer bottled for export.

Pasteurizing can be done in a large vessel before bottling, but the beer would become again impregnated by contact with the atmosphere when afterwards drawn into bottles.

This process must be conducted carefully, because if the temperature rises too high the beer gets an unpalatable taste and the albuminoids remaining in it are

ished beer must be steamed to the degree necessary to kill such germs, and for that purpose the beer must be inclosed securely in some vessel to prevent the escape of the carbonic acid gas, and of all such vessels a bottle manufactured of glass is the one best adapted for that purpose. Such beer, after being subjected to the process of steaming, is materially different from the beer before being subjected to steaming, and in order to create such different article a closed glass bottle is indispensable, and the bottles and corks, forming a portion of the complete manufactured article known as 'bottled beer,' are, as well as the hops and barley entering into the same, a necessary component part of the article when completed and in a condition ready for export."

It seems there has been some difference of opinion among the Treasury officials upon this subject, since on March 31, 1886, the then Secretary of the Treasury decided, under a statute similar to the one above cited, that a drawback should be allowed, not only for the hops, rice and barley used in the manufacture of the beer, but for the bottles and corks, and in an official table of drawback duties, published August 17, 1886, bottles and corks imported and used in bottling beer were specifically named as entitled to the benefit of a drawback to the full amount of the duty paid. This ruling remaining in force until October 28, 1890, when the Assistant Secretary decided that imported bottles used in the bottling of fermented

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more apt to be eliminated, resulting in a loss of clearness, which renders the beer unsalable.

This pasteurization may be omitted in the case of bottled beer for local use.

The bottles, previous to their use, undergo a special washing process with hot water and soda, so arranged that the bottles are filled and emptied continuously. They are then washed in a tank filled with lukewarm water on the outside by hand and on the inside by brushes in the washing machine, and then rinsed with cold water before being placed in the racks to be filled.

Old as well as new bottles are used.

X. In making bottled beer, from the time of purchase of the ingredients until the completion of the finished product the process must be so managed as to diminish the albuminoids. When prepared as stated in the foregoing findings, bottled beer can stand the heat at the equator without being spoiled.

XI. Beer bottled for export is understood to be beer intended for shipment, whether to domestic or foreign points, and for use other than local and immediate. When beer is bottled for local and immediate use, it may be the same beer as hereinbefore described and prepared in the same manner as for export, including pasteurization, or it may be the same beer prepared in the same manner without pasteurization, or it may be ordinary keg beer, differing from bottled beer for export in the particulars described in findings VII and VIII, and without pasteurization.

XII. When bottled beer is sold to retailers, it is delivered in cases of bottles, and an extra charge is made to the purchaser for the case and bottles, which charge is credited to his account on the return of the case and bottles. A similar practice obtains on the sale of the bottled beer by the case by retailers to their consumers.

liquors made here from domestic grains and hops, were not entitled to a drawback under the Tariff Act of 1890; but notwithstanding this ruling, it would appear that the drawback continued to be allowed and paid until March 24, 1893, when, in a letter to the collector of customs of New York, the Secretary overruled and rescinded the earlier decisions, and has since refused to allow the drawback.

In our view, the question presents no difficulty whatever. Under the statute, the drawback is allowed only upon "imported materials . . . used in the manufacture of articles manufactured or produced in the United States," and subsequently exported. By this is undoubtedly meant that the imported materials must enter into and form one of the ingredients of the manufactured article, as did the hops and barley upon which the drawback was allowed, and properly allowed, by the Court of Claims. But the bottles and corks are not "imported materials" at all, but finished products, and usable for any liquor which the importer may choose to put in them. Neither are they ingredients used in the manufacture of exported or any other kind of beer, in any proper sense of the term, but simply the packages which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use of for the proper preservation of his product. Bottled beer is still beer, made of the same ingredients as ordinary beer, though made with greater care, and to speak of the bottles and corks as ingredients of the beer is simply an abuse of language.

The fact that the beer must be steamed after bottling to a point necessary to kill the germs of yeast, and for that purpose must be inclosed in some vessel to prevent the escape of the carbonic acid gas, only shows that the beer is bottled before it is finally manufactured and ready for the market. This process certainly does not convert a bottle from an incasement into an ingredient. In this particular beer does not materially differ from a hundred other articles which require to be incased for their proper preservation. Thus, champagne and other sparkling wines must be bottled while yet effervescing, or they will lose the tang which gives them their principal value. The same remark may be made of Apollinaris and other effervescing waters, though not manufactured, and of certain canned fruits and vegetables which are required to be incased while hot and still in the process of preservation.

The claim is by no means so strong a one for the allowance of a drawback as was the *Tidewater Oil Co.* v. *The United States*, (171 U. S. 210,) in which imported shooks were used in the manufacture of boxes, subsequently exported to foreign countries. We held in that case that boxes constructed of shooks, which were imported in bundles of ends, sides, tops and bottoms, and needed only to be put together in the United States and in certain nailing and trimming, the whole value of which was equal to about one-tenth of the value of the boxes, were not "wholly manufactured" in

the United States within R. S. sec. 3019 and the Treasury Regulations of 1884.

It may be entirely true that, if this drawback be not allowed, the duties upon the bottles and corks will preclude the manufacturer from competing in foreign markets with foreign brewers, since he must necessarily export his beer in imported bottles, while his foreign competitor may use bottles manufactured in his own country. Yet this apparent hardship will not authorize us to do violence to the clear language of the statute. If the law afford him an imperfect relief, his remedy is by application to Congress for additional legislation, and not to the judicial power for a strained interpretation of the law already in force.

The judgment of the Court of Claims is right, and it is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.